Supreme Court, U.S.
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In The Supreme Court of the United States

No. 06-

Paul Vernon, (A#35-501-072)
Petitioner,

vs.

Alberto Gonzales, US Attorney General
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Petition For Writ Of Certiorari

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Question Presented

The Petitioner is Paul Vernon, a former native and citizen of Jamaica and an individual who asserts status as a citizen of the United States and in the alternative, a national of the United States due to his service in the United States military during the Vietnam War. The agency below, the Executive Office For Immigration Review determined that the Petitioner was not a citizen or national of the United States. The US Court Of Appeals For the Third Circuit also denied the Petitioner's claims, but did not review the Petitioner's claims under the applicable federal statute, 8 USC Section 1440. This statute, in consideration of 8 USC Section 1429, exempt, active duty veterans of foreign wars, such as the Petitioner, from the obligation to establish good moral character independent of the character displayed during their military service and permit the acquisition of US citizenship even if the veteran has been placed into removal proceedings. The agency and the Court Of Appeals below erred in ignoring these provisions of law.

The question presented is:

Whether an active duty veteran of a foreign war is a National of the United States and whether he may be denied the opportunity to become a naturalized citizen of the United States due to a finding of poor moral character and placement into removal proceedings, where the applicable statutes, 8 USC sections 1429 and 1440, clearly permit the acquisition of citizenship for such veterans as they make plain that the only good moral character at issue is the character displayed while in active duty and render placement in removal proceedings as a non issue in the naturalization process?

PARTIES TO THE PROCEEDINGS

Petitioner is Paul Vernon. Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Paul Vernon, respectfully petitions for a writ of certiorari to review the judgement of the United States Court Of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals below on both the original appeal and petition for rehearing are unreported.

JURISDICTION

The judgment of the court of appeals on the original appeal was entered on May 16, 2006. (A-3 - A-7) The decision of the court of appeals on Petitioner's petition for rehearing was entered on August 16, 2006. (A-1 - A2) The jurisdiction of this court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable constitutional and statutory sources pertinent to consideration of the instant appeal include provisions of the Immigration and Nationality Act, specifically 8 USC sections 1429 and 1440, as well as the due process clause of the United States Constitution.

STATEMENT OF THE CASE

1. Statutory Background-

This case presents questions regarding the proper interpretation of federal statutes related to the acquisition of US citizenship and National status by active duty veterans who served honorably in foreign wars on the behalf of the United States of America.

The most relevant statute is 8 USC Section 1440, which permits active duty veterans to acquire status as United States citizens upon establishment of honorable service on behalf of the United States in a foreign war, and honorable discharge under the statute.The good moral character required for

acquisition of US citizenship is that which is displayed during military service and that reflected in an honorable discharge.

The second statute is 8 USC section 1429, which provides, that an active duty veteran otherwise eligible to naturalize pursuant to 8 USC section 1440, is not barred from naturalization due to having been placed into removal proceedings as other naturalization applicants are.

Though the United States Court Of Appeals has issued a precedential decision, *Salim v. Ashcroft*, on the issue of whether aliens with no US military service can assert status as nationals of the United States, it has not yet issued a precedential decision on the status of active duty veterans pursuant to 8 USC sections 1429 and 1440. The US Courts of Appeals for the Ninth and Second circuits have rendered decisions regarding the ability of active duty veterans to naturalize. Those courts rejected the citizenship claims of the veteran litigants in question.[1] Importantly, however, neither the 9th nor the 2nd Circuit properly considered 8 USC Section 1440 in conjunction with the provisions of 8 USC Section 1429.

Inasmuch as the agency below as well as the Court of Appeals failed to view the Petitioner's citizenship and nationality claims pursuant to applicable law, the Petitioner asserts that he was denied a fundamentally fair hearing which violated his right to due process of law.

2. Proceedings below-

The Petitioner is Paul Vernon, a former native and citizen of Jamaica. The Petitioner was born on or about February 2, 1959 in Kingston, Jamaica. The Respondent, in its notice to appear, asserted that the Petitioner entered the United States as a lawful permanent resident on or about December 11, 1975 at New York, NY. Petitioner asserted that he entered

[1] *Castaglia v. INS*, 108 F.3d 1101 (9th Cir. 1997); *Nolan v. Holmes*, 334 F.3d 189 (2nd Cir. 2003); *Santamaria-Ames v. INS*, 104 F.3d 1127 (9th Cir. 1996)

the US military, serving in the United States Army on or about August 16, 1977, and was assigned the service number 132-56-3843. The Petitioner asserted that the United States was engaged in the Vietnam War at the time that he enlisted. Petitioner's assertion of active duty service during hostilities is supported by the Executive Order signed by former president Jimmy Carter, on or about September 18, 1978, in which it was determined that the statutory period of the Vietnam hostilities lasted from February 28, 1961 through October 15, 1978. Petitioner further asserted that he was released from active duty on or about July 3, 1980, following an injury for which he was treated at the Walter Reed Army Medical Center.

The Petitioner had served as a medical specialist for 2 years and 7 months, had been decorated with a marksman badge with a rifle bar, and expert badge with a hand grenade bar's and the character of his service was described as "Honorable". The reason for his separation from the service was the short period of time remaining on his enlistment following his receipt of medical treatment for the shoulder injury he sustained.

The Petitioner asserted that he, thus, served in active duty status during the Vietnam War, having been assigned to duties in the former West Germany, St. Louis, Missouri, and Washington, DC. Moreover, Petitioner asserted that he enlisted again, this time in the US Army Reserve, from February 1981 through June 30, 1983. Petitioner, asserts that when he was released from that service, he re-enlisted in the US Army from August 6, 1985 through September 20, 1985. Documentation contained in the Petitioner's FOIA file received from the Respondent indicates that the Petitioner's period of enlistment from August 6 1985 through September 20, 1985 was brief due to Petitioner's failure to meet medical/fitness standards.

Petitioner asserted that he filed two applications for naturalization, the first appears to have been form N –400 which appears to have been received for processing by the Respondent on or about September 19, 1986. Petitioner asserted that when the first application was filed, he had not yet married. Documentation received from Petitioner's FOIA file from the Respondent indicates that on the first application, his father Vincent Vernon was still alive and residing in Kingston, Jamaica. Documentation received from the Petitioner's FOIA file indicates that the Petitioner's naturalization case was "closed" on or about January 20, 1987 because he had "naturalized".

Due to documentation received through his FOIA file from the Respondent, Petitioner asserted that he filed a second N–400 application some time after August 1997. Though the actual N–400 application was not submitted to the Petitioner, he did receive a copy of the form G-325, Biographical Information sheet from the Respondent as part of its response to Petitioner's FOIA request.

The Petitioner asserted that the only application he recieved through FOIA was that submitted in 1986. The 1997 application was not provided to the Petitioner. The 1997 application noted that his father was deceased and that he had married Lola Brown in 1987. Petitioner asserted that his actual N-400 application filed in 1997 is among the many pages that were redacted from his FOIA request, and, for that reason, he could not produce the document as evidence because he no longer has his file copy of the document.

Petitioner asserted that although a third application appears to have been filed for him in 1999, he did not file the application. Documentation received from his FOIA file indicates that on or about January 6, 1999, someone from US INS submitted a request for certification of military or naval service form to the military. Petitioner asserted that the

request form was not signed by him, prepared by him, nor did he know it had been submitted to the military. Petitioner asserts that on or about January 28, 1999, the National Personnel Records Center responded to the US INS inquiry and submitted a completed certification of miliary or naval service form to the agency.

The Respondent placed the Petitioner into removal proceedings on or about August 27, 2003. In the charging document, the Respondent contended that the Petitioner was not a citizen or national of the United States and that he was removable due to having convictions for several crimes, including criminal possession of marijuana, in violation of NYPL 221.10 on August 25, 1986, criminal possession of marijuana, in violation of NYPL 221.10 on December 19, 1986, criminal possession of a weapon, in violation of NYPL 265.02 on January 9, 1991 and possession of a firearm in violation of USC 922(g)(1). The agency sought the Petitioner's removal pursuant to INA sections 237(a)(2)(A)(iii), pursuant to INA section 101(a)(43)(B), 237(a)(2)(B)(i), 237(a)(2)(C) and 237(a)(2)(A)(iii), pursuant to INA section 101(a)(43)(E), respectively.

The Petitioner denied the allegation regarding his United States nationality and citizenship and contended that he was a citizen and/or national of the United States. Petitioner sought to terminate the removal proceedings on the basis that he was a citizen and national of the United States. The agency opposed grant of the Petitioner's filings/motions . The immigration judge denied the motion to terminate in the oral decision, entered on or about August 31, 2004. The immigration judge also sustained the allegations and charges of removal contained in the notice to appear.

The Petitioner filed an appeal of the removal decision with the Board of Immigration Appeals, but it was denied on or about February 4, 2005, without a written decision/opinion. The Petitioner filed a petition for habeas corpus with the US District Court for the Middle District of Pennsylvania.

On or about June 8, 2005, the habeas action was transferred to the court of appeals for the third circuit through operation of the Real ID Act, enacted on or about May 11, 2005. It appears that the Petitioner's former counsel filed a traverse after entering an appearance before the Middle District, on or about June 3, 2005. Petitioner asserted that he never received a visit from former counsel before documents regarding his legal claims on appeal were filed with the Court of Appeals. The Petitioner asserted that he recieved ineffective assistance of former counsel.

The Court of Appeals denied the Petitioner's petition for review on or about May 16, 2006. Petitioner filed a timely petition for rehearing requesting that his citizenship claim be analyzed pursuant to 8 USC Sections 1440 and 1429, and asserted ineffective assistance of former counsel. The Court of Appeals declined to grant the petition for rehearing without further explanation.

REASONS FOR GRANTING THE PETITION

A. Petitioner's Eligibility to Naturalize

Several courts of appeals, namely the 2nd and the 9th Circuits have ruled, erroneously, that active duty veterans who served honorably and were discharged honorably are subject to the same good moral character criteria as other naturalization applicants and that placement in removal proceedings serves as a bar to their naturalization. The findings of the aforementioned Courts of Appeal are plainly and patently wrong given the plain language of 8 USC Sections 1429 and 1440. Inasmuch as other Courts of Appeal remain silent on this issue, they have not issued precedential decisions on this issue, action by this Court is required to resolve the issue and clarify the citizenship/ national status of this class of individuals and to prevent further disagreement among the Circuits.

The sole authority to naturalize persons as citizens of the United State is conferred upon the Attorney General. 8 USC Section 1421. Federal courts are, however, only obligated to pay deference to the Attorney General's interpretation of naturalization statutes where it's interpretation is based on a permissible construction of the statute in question and the statute in question is silent or ambiguous. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984) No deference is due where the language of the statute is clear on its face or the intent of the legislature is clearly discernable. *INS v. Cardoza-Fonseca*, 480 US 421 (1987) [See also, *INS v. St. Cyr,* 121 S.Ct. 2271 (2001)] Further, deference is not due where there are compelling indications that the agency interpretation is incorrect. *Espinoza v. Farah Manufactoring Co.,* 414 US 86 (1973) This is especially so where the agency interpretation is not even minimally rational. *Iavorski v. USINS*, 232 F.3d 124 (2nd Cir. 2000)

The Attorney General has been given authority to adjudicate applications for naturalization, including those of active duty veterans.[2] The statute regarding the naturalization for such active duty veterans, INA section 329 states:

> "(a) Any person who, while an alien or a non-citizen national of the United States, has served honorably in an active-duty status in the military, ...or during a period beginning February 28, 1961 and ending on a date designated by the President by Executive Order as the date of termination of the Vietnam hostilities...and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section

[2]For purposes of this brief, the term "active duty veteran" means an individual eligible to apply for naturalization pursuant to INA 329 due to his having served honorably in the United States military on active duty, during a period of military hostilities covered by the statute who received an honorable discharge from the military.

if (1) at the time of enlistment or indiction such person shall have been in the United States...whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction of such person shall have been admitted to the United States for permanent residence. The executive department under which such person served shall determine whether (such) persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions...(b) A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that:

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 318 as they relate to deportability and the provisions of section 331;

(2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required; and

(3) service in the military...of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status during...(the Vietnam hostilities)... and was separated from such service under honorable conditions."

INA section 329.

Specifically, though INS section 329 does not contain any specific reference to a requirement of good moral character, some federal courts have determined that such a requirement exists. Most recently, the US Court of Appeals

for the Second Circuit issued decisions regarding the naturalization eligibility requirements for veterans seeking to naturalize pursuant to INA section 329, *Nolan v. Holmes*, 334 F.3d 189 (2nd Cir. 2003) and *Boatswain v. Gonzales*, –F.3d. – (2nd. Cir. 2005), finding a requirement of good moral character.[3] Similarly, the US Court of Appeals for the Ninth Circuit, when discussing the naturalization eligibility of veterans under INA section 329 found a good moral character requirement. [See, *Castiglia v. INS*, 108 F.3d 1101 (9th Cir. 1997); see also, *Santamaria-Ames v. INS*, 104 F.3d 1127 (9th Cir. 1996) and *Yen Jung v. Barber*, 184 F.2d 491 (9th Cir. 1950)][4]

Essentially, the courts adjudicating the INA section 329 claims cited above determined that the agency's determination, through its regulations, found at 8 CFR section 329.2(d), that good moral character is required, was "reasonable".[5]

Citing *Mugalli v. Ashcroft*, 258 F.52 (2nd Cir. 2001), the Second Circuit stated that the agency's assertion that INA section 329 contains a good moral character requirement was reasonable because, "...it is not necessary that we conclude that the agency's interpretation of the statute is the only permissible interpretation, nor that we believe it to be the best interpretation of the statute. Rather, in order to affirm

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[3]Petitioner asserts that his appeal is distinguishable from those presented by Petitioners Nolan and Boatswain. Veteran Nolan did not apply for naturalization until after he was in removal proceedings and, thus, if this court deems 8 CFR section 329.2(d) to be a valid regulation, Mr. Nolan could not have established good moral character one year prior to the filing of his application. Petitioner's firts application was filed in 1986. He was not placed into removal proceedings until July 2002. Petitioner asserts that his appeal is distinguishable from that of veteran Boatswain on similar grounds.

[4]Again, for reasons to be discussed below, the Petitioner asserts that his claim to naturalization eligibility pursuant to INA section 329 is distinguishable from those presented to the US Court Of Appeals for the 9th Circuit by the respective veterans.

[5]This regulation provides that a veteran seeking to naturalize pursuant to INA section 329 must establish that for the year prior to filing the application for naturalization he was a person of good moral character and that he continues to be a person of good moral character.

the BIA's determination, we need only conclude that its interpretation is reasonable and that it considered the matter in a detailed and reasoned fashion." Id at 196.

In reaching its determination that the agency's determination was "reasonable" the court stated plainly that the statute is "ambiguous" and noted a potential policy conflict between Congress' desire to provide special naturalization " benefits" to active duty veterans and the general need to require good moral character of individuals seeking naturalization. The Court further asserted that since the military generally requires high standards of conduct from its service personnel, it "hardly seems unreasonable for INS to have inferred that Congress would not have intended to (require good moral character of active duty veterans seeking to naturalize ..." (Id) [6]

While less thorough than the analysis provided by the Second Circuit, the Ninth's circuit's evaluation of the naturalization eligibility requirements under INA Section 329 also led to its finding that active duty military personnel must establish good moral character in order to qualify for naturalization. Relying on agency regulation 8 CFR

[6]The court ignored the fact that good moral character was required that is why the active duty veteran had to establish that he served honorably and was discharged from the service honorably. As part of the naturalization benefit bestowed upon active duty veterans, Congress limited the time for which good conduct was required to the time in which the veteran served the country during war.

section 329.2(d), the Ninth Circuit found that the general requirement of good moral character applicable to naturalization applicants under INA 316 was also applicable to active duty veterans applying for naturalization under INA 329. [See *Santamaria-Ames* and *Castiglia* (supra)][7]

In *Santamaria*, the Ninth Circuit determined that though good moral character was required to be shown, its absence could not be presumed simply by reference to an alien's criminal history prior to the relevant period of time for which good moral character is required. Thus, while an alien is required to establish good moral character for the one year period prior to the filing of the application for naturalization, and during the time between the filing of the application and the adjudication of the application, there was no requirement of good moral character prior to one year before his application was filed.

Since the District Court had presumed that good moral character could not be proven where bad acts had been committed prior to the relevant periods of time, the Ninth Circuit remanded the matter to the District Court for a determination as to whether the veteran had good moral character during the requisite period of time only.

In contrast, the veteran in *Castiglia* asserted that he was not required to establish good moral character, but that assertion was rejected due to the fact that the veteran had

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[7]Petitioner asserts that his appeal is distinguishable from that of Petitioner Santamaria who filed his application for naturalization after he was placed into deportation proceedings. Petitioner asserts that due to operation of INA section 329(b)(1), 8 CFR section 329.2(d) is invalid, but, even if 8 CFR section 329.2(d) is deemed valid, Santamaria would have been unable to establish good moral character for 1 year prior to submission of his naturalization application. Petitioner's naturalization application was filed in March 1986 and, thus, he had the requisite good moral character one year prior the filing of the application. Similarly, Petitioner's case is distinguishable from that of veteran Castiglia because Mr. Castiglia had committed an aggravated felony, murder, prior to the filing of his naturalization application. Petitioner had no aggravated felony convictions one year prior to the filing of his naturalization application in 1986.

been convicted of second degree murder. The court determined that since that type of crime he comitted was designated as an aggravated felony and aggravated felons were deemed to lack good moral character by reference to INA section 101(f), it was impossible for Castiglia to meet the naturalization eligibility requirements of INA 316.[8]

Notwithstanding the analysis provided by the Second and Ninth Circuits on the issue of whether active duty veterans are required to show good moral character, Petitioner asserts that the legal conclusions rendered are in error and that their flawed analysis should be rejected.

Petitioner asserts that the analysis of INA 329 provided by the Second and Ninth Circuits rendered portions of the statute superfluous and, for that reason, their respective interpretations are invalid. Specifically, the analysis offered by the Second and Ninth Circuits ignored and failed to take into account the language of INA 329(b)(1) that says that an active duty veteran can naturalize without respect to his age AND without respect to issues relating to his deportability as specified in INA 318.[9] Neither the Second nor Ninth Circuits discussed the applicability of INA 329(b)(1) in the aforementioned decisions or how that statute is to be read in context of INA 318 The language of INA 329(b)(1) clearly exempts active duty veterans from the potential barrier to naturalization outlined at 8 USC Section 1429 Active duty veterans are not required to comply with that statutory provision.[10]

[8]The Second Circuit addressed the issue of whether the aggravated felony bar to good moral character found at INA section 101(f) was applicable to active duty veterans seeking to naturalize under INA 329 in *Boatswain v. Gonzales* (supra). The Second Circuit determined that as an aggravated felony veteran Boatswain could not meet the good moral character requirement of INA 329.

[9]INA 329(b)(1) also permits naturalization without regard to the provisions of INA 331 , but inasmuch as that section of law is inapplicable to this Petitioner's claims on appeal, it has not been discussed.

[10]In view of INA 329(b)(1)'s apparent waiver of deportable conduct as a barrier to naturalization, the Second Circuit's conclusion in Nolan that Congress must have intended that active duty veterans show good moral character because military personnel are generally required to show good moral character, appears to be incorrect.

Clearly, INA section 329(b)(1) evidences Congress' intent to permit an active duty veteran to naturalize, irrespective of the fact that he might be currently in removal proceedings or might have already had an order of deportation/removal issued against him. The willingness of active duty veterans to expose themselves to the risks of combat, rather than the length of time the veteran is exposed to the risk, appears to be the important factor in the grant of the naturalization benefit. This view is supported by the fact that active duty veterans are not required to serve in the military for a specified period of time before becoming eligible fornaturalization under INA 329(a). This is in contrast to peace time veterans who must prove that they served three years in the military in the aggregate. [See, INA section 328(a)][11]

Further, Congress is deemed to be familiar with other existing law when it adopts legislation. *Valansi v. Ashcroft*, 278 F.3d 203 (3rd. Cir. 2002) With respect to Petitioner's claims in this appeal, Congress had to be aware that naturalization candidates are generally barred from naturalizing if they are in removal/deportation proceedings or have a final order issued against them. Thus, when Congress, in INA 329(b)(1), asserted that active duty veterans could, naturalize nonetheless, even if the immigration authorities were seeking to deport/remove them or had already obtained an order authorizing deportation/ removal, it had to know that other naturalization applicants would be unable to benefit from this provision of law. [12]

Similarly, inasmuch as Congress used similar, but not identical, language in INA 328(b)(1), it had to intend that these two classes of military personnel receive naturalization benefits

[11]Though the 3rd Circuit said the Petitioner's nationalization application was untimley, there is no filing deadline applicable to section 329 applicants.

[12]The only other class of naturalization applicants provided with such a benefit are service people who are actually in the military at the time they seek naturalization. Unlike active duty veterans who are authorized to naturalize automatically, current military personnel can only naturalize, if prior to submitting an application for naturalization, the individual appeared before an immigration official for a naturalization examination.

permitting them to avoid the consequences of naturalization barriers that are applicable to other classes of naturalization candidates. Inasmuch as the class of beneficiaries entitled to naturalize under 328 and 329 is defined narrowly, it must be presumed that Congress acted intentionally. Further, where Congress uses the same word or phrase in the same statutory scheme, Congress intends for the word or phrase to mean the same thing each time it is used. *Commissioner v. Keystone Consolidated Industries Inc.*, 508 US 152 (1993) Therefore, it is obvious that Congress intended to confer the naturalization benefit outlined at INA sections 328 and 329 upon these two specified classes of applicants for naturalization and intended to shield both classes of applicants from the requirements of section 318.

Additionally, a plain reading of INA section 318 establishes that Congress did not require active duty veterans to establish good moral character in order to naturalize pursuant to section 329. Under section 318, all naturalization applicants, EXCEPT those permitted to naturalize pursuant to INA 328 and 329 must show good moral character EVEN IF their removal has been terminated by or cancelled by the Attorney General because, for those applicants, grant of termination or cancellation of removal is not binding with respect to establishment of their good moral character. The statute does not say, however, that the decision to overlook the deportation/removal order or proceedings entered against an applicant under 329 or 328 is not binding on the Attorney General with respect to considerations of good moral character.

It is a well established point of statutory construction that where a legislative body utilizes different language in different portions of the same statute, it is presumed that the use of different language was intentional. *INS v. Cardoza-Fonseca*, 480 US 421 (1987)

Stated differently, if Congress wanted to permit an examination of good moral character for applicants seeking to naturalize under sections 328 and 329, notwithstanding the fact that their deportation/ removal orders/proceedings would be overlooked in the naturalization process, Congress could have stated expressly in section 318 that the Attorney General was not bound by any provision of law that overlooked the entry of a deportation/removal order or initiation of deportation/removal proceedings against a naturalization applicant in adjudicating a naturalization application. Congress, however did not state that. Thus, it is clear that Congress intended to limit the Attorney General's adjudication authority over applicants seeking naturalization pursuant to sections 328 and 329.

> The relevant portion of section 318 says:
> ...Provided that the findings of the Attorney General in terminating removal proceedings or in canceling the removal of an alien pursuant to the provisions of this Act, shall not be deemed binding in any way upon the Attorney General with respect to the question of whether such person has established his eligibility for naturalization as required by this title...

It seems apparent that in enacting section 318, Congress, in recognition of the fact that a naturalization applicant may have engaged in conduct that might usually result in removal/deportation, and yet, nonetheless, be given relief to stop the removal/deportation. In such situations, Congress did not want to limit the naturalization adjudication authority of the Attorney General, and permitted the Attorney General to make an adjudication on the naturalization application that was separate and distinct from any adjudication occurring in the removal/ deportation proceedings.[13] Thus, a finding

[13]Support for this view is evidenced by the fact that Congress, in enacting INA section 316(d) stated: "No finding by the Attorney General that the applicant is not deportable shall be accepted as conclusive evidence of good moral character."

in removal proceedings that a naturalization applicant warranted a grant of cancellation of removal was not to be deemed to be de facto proof that the applicant had the good moral character necessary to obtain naturalization.

In permitting the deportation/removal problems of section 329 naturalization applicants to be overlooked in the naturalization process and in not granting the Attorney General express authorization to conduct a separate adjudication regarding good moral character pursuant to section 318, as is permitted for other naturalization applicants, Congress evidenced an intent to limit the Attorney General's adjudication authority over section 329 applicants. Neither the Second nor the Ninth Circuit attempted to reconcile the language of section 329(b)(1), or section 318 with their legal conclusions that active duty veterans have to establish good moral character in order to be eligible to naturalize. In actuality, there is no way to reconcile 329(b)(1) with the analysis provided by the Second and Ninth Circuits. The assertion that good moral character is required of active duty veterans is irrational and unreasonable because it would make no sense for Congress to set up a naturalization scheme that would permit active duty veterans to naturalize even if they have orders of deportation/removal entered against them or are in removal proceedings only to then allow those same veterans to be denied naturalization on the grounds that they lack good moral character for acts for which their deportation/removal was either not sought or sought but, pursuant to INA 329(b)(1), deemed irrelevant.

Further, neither the Second nor the Ninth Circuit attempted to reconcile the language of INA section 329(b)(3) in their respective analyses as to whether an active duty veteran is required to establish good moral character in order to naturalize. For its part, INA section 329(b)(3) states that a naturalization applicant seeking eligibility under section 329 has to establish his service in the military evidenced by an authenticated certification issued by the relevant branch of

the military that attests to the applicant's honorable service, in active duty status during military hostilities, and that the applicant received an honorable discharge.

Petitioner asserts that the only good moral character that Congress intended to be proven by a section 329 applicant is the good moral character while in the service.

Section 329(b) does not just require an honorable discharge, it also requires proof that the applicant served honorably ***in an active duty status during military hostilities***. Not just anyone can attest to the section 329 applicant's qualification/eligibility in this regard, documentation must be provided by the military its self. Thus, the statute requires the US military to vouch for the section 329 applicant's good moral character during the time when such good moral character was relevant, while on active duty during a period of hostilities. In the course of providing documentation regarding the section 329 applicant's eligibility, Congress requires an official assessment of the applicant's character.

Thus, inasmuch as section 329(b)(3) can reasonably be deemed to be a good moral character provision, the assertion by the Second and Ninth Circuits that section 329 applicants must meet the same good moral character requirements as other naturalization applicants, is without foundation.

It is a well accepted tenet of statutory construction that a statute of general applicability does not control a statute of specific applicability absent clear intent on the part of the legislature that such a result occur. *Morton v. Mancari*, 417 US 535 (1974) It is clear that Congress intended that specific requirements outlined in section 329 govern the naturalization of active duty veterans rather than the general requirements of section 316. In subsection (b) of 329 Congress said: " A person filing an application under subsection (a) of this section shall comply in ***all other respects*** with the requirements of this title, ***except that*** ...".

Petitioner asserts that this language must be interpreted to mean that the naturalization requirements listed in 329 are the primary requirements for active duty veterans and that the general requirements of 316 are only applicable ***if*** unaddressed in section 329. Petitioner asserts that the Second and Ninth Circuits erred in interpreting the language of 329(b) to read that good moral character had to be proven in accord with the general provisions of section 316(a)(3) because, in fact, Congress did provide a good moral character provision in section 329 that was unique and specific to section 329 applicants.

Section 329 applicants have their good moral character proven by the determination of officials within their military service that their service was honorable and while serving in an active duty status. Such applicants also have to document their honorable discharge from the service [See INA section 329(a)] Section 329(b)(3) further clarifies this requirement by requiring a duly authenticated certification from the military regarding the applicant's honorable service in active duty status and honorable discharge. This was the scheme established by Congress to specifically address good moral character for active duty veterans.

Importantly, INA section 329 does not permit just any active duty veteran to naturalize. Rather, only those who served ***honorably*** in ***active duty*** AND who were ***discharged honorably*** (ie had good moral character for the requisite periods of time) could receive this naturalization benefit. Those veterans who did not serve honorably, were not in active duty and/or who were not discharged honorably and who wish to naturalize are subject to the general requirements of 316(a)(3).

There does not seem to be any dispute that section 329 was intended to be a "reward" for ***honorable*** active duty military service during a period of hostilities.[14] The interpretation of

[14]The Ninth Circuit in *Santamaria-Ames* stated that the legislative history verified Congressional intent to provide a benefit to military personnel who served honorably in active duty, citing S. Rep., No 90-1292, 90th Cong., 2nd Sess. (1968).

section 329 advanced by the Ninth and Second circuits , however, throws all military veterans into the same category with respect to establishment of good moral character when it is clear that the military did not view them the same and Congress did not intend to bestow the same privileges upon them. Petitioner asserts that the only reasonable interpretation of section 329 is that if the military will vouch for the veteran's good moral character for the requisite period of time, after having met specified requirements, there is no need to prove it by any other means.

Further proof of the correctness of this interpretation is the fact that in section 316(a)(3) good moral character is necessarily linked to the specified residency/physical presence period: "(3) during all the periods referred to in this subsection has been and still is a person of good moral character...". Section 329(b)(2), however, contains no period of residence or specified period of physical presence. It seems quite clear that there is no separate period of physical presence or residency required under 329 because the relevant period of time for the active duty veteran to show good moral character is the period when he is on active duty during hostilities, and not any other time. The Second and Ninth Circuits could only resolve this statutory dilemma by endorsing the agency regulation found at 8 CFR 329.2(d) that purports to impose a one year good moral character requirement. But, again, an agency regulation can only be upheld and federal courts are only obligated to show deference to the agency interpretation if the interpretation is reasonable. Here, the agency interpretation is not reasonable.

INA Section 329(b)(2) states plainly that no period of residence or physical presence is required in order for an active duty veteran to naturalize. By contrast, section 316(a)(3) mandates a showing of good moral character for all specified periods of physical presence and residence.

Reading these two divergent statutes with the aim of reconciling the intent of Congress, so as to give full force and effect to each statute, requires an interpretation that says that there is no good moral character requirement unless there is a requisite period of physical presence and residency. Since the general statute can not control the specific statute, section 316(a)(3) can not impose any requirement of good moral character on section 329 applicants because section 329 does not contain any required periods of residence/ or physical presence.

Similarly, the agency regulation at 8 CFR 329.2(d) can not purport to impose good moral character requirements on INA section 329 applicants beyond what is permitted by the underlying statute. Since INA 329 does not impose a one year period of physical presence or residency, and good moral character under 316(a)(3) can only attach to such periods of residency and physical presence, the agency regulation is void.

Everything about the naturalization statutory scheme set forth by Congress evidences a clear intent on the part of Congress to set apart and favor active duty veterans in the naturalization process. Given these clear differences in the treatment of section 329 naturalization applicants and other naturalization applicants, neither the Second nor the Ninth Circuits provided any explanation as to why the assertion that different good moral character requirements are imposed on section 329 applicants was unreasonable.

The above argument notwithstanding, in the instant Petitioner's case, lack of good moral character was not the basis for the denial of his naturalization application. His application was denied on the basis that he had a final order of removal entered against him was untimely. As discussed above, this determination by the court below is plain error. INA section 329(b)(1) exempts active duty veterans such as Petitioner

from the provisions of INA 318 and issuance of an order of removal is not a legitimate basis for denial of a INA 329 naturalization application.

B. Petitioner's status as a national of the United States

With respect to his claim of US nationality, Petitioner asserts that the United States has been traditionally hospitable to active duty veterans, and that aliens, in general, have been accorded a ***generous and ascending scale of rights*** as they increase their identity with our society: "...Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, AND they expand to those of full citizenship upon naturalization." [See, *Johnson v. Eisentrager*, 339 US 763, 768 (Section 2) (1950)]

The basis of the Petitioner's assertion that he is not only eligible for status as a citizen of the United States, but also a national of the United States is the fact that he has asserted permanent allegiance to the United States, filed an application for naturalization prior to being placed into removal proceedings and has resided in New York state for a substantial period of time.

That it was the clear intent of Congress to include members of Petitioner's class within the definition of nationals of the US is established by reference to 8 USC section 325 entitled: "Nationals but not citizens; residence within outlying possessions."

That statute reads:

> A person not a citizen who owes permanent allegiance to the United States, and who is otherwise qualified, may, if he becomes a resident of any ***state***, be naturalized upon compliance with the applicable requirements of this title, ***except that in applications for naturalization filed under the provisions of this section residence and physical presence within the United States within the meaning of his title shall include residence and physical presence within any of the outlying possessions of the United States.*** (emphasis added)

(See 8 USC 1436)

Clearly, the statute does not refer to any and all lawful permanent residents as they do not all owe an allegiance to the United States, not all are eligible to naturalize and not all seek naturalization. Interpreting the language of the statue in a manner that recognizes the plain meaning of the text, it is clear that INA section 325 it recognizes ***two classes of nationals***: first, a non citizen individual, ***not residing*** in an outlying possession, whose eligibility to naturalize is dependent upon his establishment of a residence in a "***state***" and who owes permanent allegiance to the United States, and second, a non-citizen national ***residing in*** the outlying possessions of the United States, who, through operation of the exception contained in the statute, can naturalize even if he never establishes a residence in a "state". Petitioner asserts membership in the first category, as a resident of New York state, and is thus a National of the United States.

The analysis of the Court of Appeals in *Salim v. Ashcroft*, 350 F.3d 307 (3rd Cir. 2003), The Respondent in the removal proceedings failed to recognize the "generous and ascending scale of rights (afforded to the non-citizen) ***as he increases his identity with our society***" *Eisentrager* (supra) and, in fact, rebuffed the analysis of this court without any attempt to explain the inconsistency.

Conclusion

WHEREFORE, for all the aforementioned reasons, Petitioner respectfully asks that the petition for certiorari be GRANTED.

Sincerely,

Sandra Greene, Esquire
2001 East Market Street
York, Pennsylvania 17402
(717) 755-8188
Attorney For Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2934

Paul Vernon,
Petitioner,
v.
Attorney General of the United States
Respondent.

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, Circuit Judges, IRENAS*, District Judge

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The Petition for Rehearing filed by the Petitioner in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,
/s/ Julio M. Fuentes
Circuit Judge

DATED: August 15, 2006
CRG/cc: Sandra Greene, Esq.
Thomas Griffin, Esq.
Michael J. Butler, Esq.

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*Judge Irenas' vote is limited to panel rehearing only.

A-3
NON PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2934

Paul Vernon,
Petitioner,

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v.
Attorney General of the United States
Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals
(BIA No. A35-501-072)

Submitted Under Third Circuit LAR 34.1(a)
April 28, 2006
Before: AMBRO and FUENTES, Circuit Judges, and IRENAS* District Judge
(Filed: May 16, 2006)

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* Honorable Joseph E. Irenas, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge .

Paul Vernon petitions for review of the Board of Immigration Appeals' (BIA) decision affirming an Immigration Judge's ("IJ") finding that Vernon is removable based on his past criminal convictions. Although the action began in the United States District Court for the Middle District of Pennsylvania as a petition for a writ of habeas corpus under 28 USC section 2241, the District Court transferred the petition to this Court pursuant to the REAL ID Act of 2005. For the reasons the follow, we will deny Vernon's petition for review.

I. Facts and Procedural History

Vernon, a native and citizen of Jamaica, entered the United States as an immigrant in 1975. Vernon served in the United States Army beginning in 1977 and, aside from a two-year break in service, remained on either active duty or in reserve status until his honorable discharge in 1985. Due to his honorable military service during hostilities, Vernon was qualified for expeditious naturalization under 8 USC section 1440. On August 5, 1986, Vernon completed, signed and mailed his naturalization application to the Immigration and Naturalization Service ("INS"), and the application was stamped "RECEIVED" by the INS on September 19, 1986. Vernon was scheduled for an "examination appointment date" on January 8, 1987. According to Vernon, however, the INS never notified him of this appointment. On January 20, 1987, the INS closed Vernon's naturalization proceedings.

According to Vernon, the INS neither notified him of its action nor advised him of his right to seek review of the decision.

Beginning shortly after he submitted his naturalization application, Vernon committed a number of crimes for which he was convicted. On August 26, 1986, Vernon was convicted in Bronx Country Criminal Court, Bronx, New York, for criminal possession of marijuana in violation of New York Penal Code 221.10. On December 19, 1986, Vernon was again convicted in Bronx County Criminal Court for criminal possession of marijuana in violation of New York Penal Code 221.10. On January 9. 1991, Vernon was convicted in Bronx County Supreme Court , Bronx, New York for criminal possession of a weapon in violation of New York Penal Code 265.02, and he was sentenced to six months in prison. On April 29, 2003, Vernon was convicted of the offense of felon in possession of a firearm and ammunition in violation of 18 USC section 922(g)(1), and he was sentenced to 34 months in prison.

On August 27, 2003, based on his convictions, the INS commenced removal proceedings against Vernon. The Notice to Appear charged (1) that Vernon's convictions rendered him removable from the United States pursuant to 8 USC section 1227(a)(2)(A)(iii), because he had been convicted of an aggravated felony related to a firearms offense, and (2) that Vernon's conviction for illegally possession a firearm, part or accessory under 18 USC section 921(a) rendered him removable pursuant to 8 USC section 1227(a)(2)(C).

Following a hearing, an IJ ruled that Vernon was removable based on his firearms convictions. The IJ also denied Vernon's request to terminate the removal proceedings

based on Vernon's claim that he was eligible for naturalization. Finally, the IJ found that Vernon's aggravated felony conviction barred him from establishing that he was of good moral character. The BIA affirmed the IJ's decision without opinion.

On or about February 11, 2005, Vernon filed a petition for writ of habeas corpus pursuant to 28 USC section 2241, arguing that he is statutorily eligible for naturalization. On June 7, 2005, the District Court transferred Vernon's petition to this Court which converted it into a petition for review pursuant to the REAL ID Act. This Court has jurisdiction over petitions for review under 8 USC section 1252, and venue is proper in this Court because the proceedings before the IJ were completed in Philadelphia, Pennsylvania.

II. Discussion

Vernon does not dispute that he is ineligible for naturalization today on account of his criminal convictions. Rather, Vernon contends that, because the INS failed to comply with its own regulations governing the processing and adjudication of naturalization applications submitted by lawful permanent residents who are eligible for citizenship, this Court should either grant him citizenship or order the INS to complete his naturalization adjudication nunc pro tunc under the laws and factual circumstances in existence at the time he applied for naturalization in 1986.

We will deny Vernon's petition for review. Nunc pro tunc, literally "now for then," allows a court sitting in equity to deem an action to have been taken as of a time when it should have been taken, but was not due to circumstances not

attributable to the unreasonable delay of the parties. Mitchell v. Overman, 103 US 62, 65 (1881). Here, Vernon offers no excuse or explanation as to why he never sought clarification or reconsideration of his application for naturalization from the time he filed it in 1986 until he raised it as an issue before the IJ seventeen years later. Even assuming part of this delay was due to agency error, that the delay extended from 1986 until 2003 is directly attributable to Vernon. Accordingly, this Court cannot order that Vernon's naturalization application be considered nunc pro tunc .

In view of the complete bar to naturalization of aliens convicted of aggravated felonies at any time, 8 USC section 1101(f)(8), Vernon's firearms conviction renders him unable to establish that he is prima facie eligible for naturalization as a veteran of the armed forces under 8 USC section 1440. Thus, this Court is unable to grant him citizenship.

III. Conclusion

Because Vernon has not established that he qualifies for naturalization and has not established that his constitutional rights were violated, we will deny his petition for review.

US DEPARTMENT OF JUSTICE
Executive Office For Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A35-501-072 - Philadelphia Date: February 4, 2005
In Re: VERNON, PAUL DONOVAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se
ON BEHALF OF DHS: Josh A. Davison, Assistant Chief Counsel

ORDER:

PER CURIAM: The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See, 8 CFR section 1003.1(e)(4).

(Roger A Pauley)

FOR THE BOARD